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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1520

RICHARD J. ELROD, INDIVIDUALLY, AND AS SHERIFF OF COOK COUNTY, ILLINOIS; THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, A CORPORATION; DEMOCRATIC COUNTY CENTRAL COMMITTEE OF COOK COUNTY AND RICHARD J. DALEY, INDIVIDUALLY, AND AS PRESIDENT OF THE DEMOCRATIC ORGANIZATION OF COOK COUNTY AND AS CHAIRMAN OF THE DEMOCRATIC COUNTY CENTRAL COMMITTEE OF COOK COUNTY,

Petitioners,

vs.

JOHN BURNS, FRANK VARGAS, JOSEPH DENNARD, AND FRED BUCKLEY, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS WHO WERE EMPLOYEES OF THE SHERIFF OF COOK COUNTY ON DECEMBER 7, 1970 AND WHO WERE NOT PROTECTED BY CIVIL SERVICE OR OTHER LAWS AGAINST ARBITRARY DISCHARGE FROM THEIR EMPLOYMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

Report of Opinion 2

Jurisdiction 2

Questions Presented for Review 3

Statement of the Case 4

Argument 6-33

Introduction 6

I. No Constitutional Prohibition Exists Against Discharge of Non-Civil Service Governmental Employees For Political Reasons 7

A. First Amendment Rights Are Not Absolute and Specific Rights Thereunder Are Afforded Differing Degrees of Legal Protection Under Differing Circumstances 7

B. The Freedom of Political Association Per Se. 10

C. Freedom of Political Association and Non-Civil Service Public Employment 12

The Effective Discharge of Duties of the Executive Branch of Government 14

First Amendment Rights of the Public Employer 16

Separation of Powers 18

Political Association 20

Philosophy of Representative Government . 21

D. The Irrational Consequences of the Seventh Circuit Position on the Issue of Freedom of Political Association 23

E. The Patronage System 24

II. A Preliminary Injunction Cannot Properly Be Granted Herein 30

A. If an Injunction Were Granted, Irreparable Injury Would Be Suffered by the Defendants and the General Public 30

B. Federal Equity Power Is Limited by Traditional Principles of Equity Jurisdiction 32

Conclusion 33

Appendix A A1-6

Appendix B A7

CITATIONS.

Alomar v. Dwyer, 447 F. 2d 482 (2d Cir. 1971) 5, 6

American Communications Ass'n. v. Douds, 339 U. S. 382 (1950) 6, 8, 9, 11-15, 29

Am. Fed. of State etc. Employees v. Shapp, 443 Pa. 527, 280 A. 2d 375 (1971) 6, 15

Arnett v. Kennedy, 94 S. Ct. 1633 (1974) 6, 7

Bailey v. Richardson, 182 F. 2d 46 (D. C. Cir. 1950) ... 6

Baker v. Carr, 369 U. S. 186 (1962) 20

Chaplinksky v. New Hampshire, 315 U. S. 568 (1942) .. 8

Cox v. Louisiana, 379 U. S. 536 (1965) 8

Cramp v. Bd. of Public Instruction, 368 U. S. 278 (1961). 10

Eastern Airlines v. Civil Aeronautics Board, 261 F. 2d 830 (2nd Cir. 1958) 30

Gaines Dry Cleaners v. Chicago, 123 F. 2d 104 (7th Cir. 1941) 31

Garner v. Board of Public Works, 341 U. S. 716 (1951) .. 11

Gerende v. Board of Supervisors, 341 U. S. 56 (1951) ... 12

In re Sawyer, 124 U. S. 200 (1888) 32

Illinois State Employees Union v. Lewis, 473 F. 2d 561 (7th Cir. 1972) .....5, 7, 10, 23 *passim*

Indiana State Employees v. Negley, 365 F. Supp. 225 (S. D. Ind. 1973), *aff'd* 501 F. 2d 1239 ..... 6, 7

Keyishian v. Board of Regents, 385 U. S. 589 (1967) 10

Moldowsky v. Lindsay, 341 F. Supp. 1393 (S. D. N. Y. 1972) 6

Myers v. United States, 272 U. S. 52 (1926) 18

N. A. A. C. P. v. Button, 371 U. S. 415 (1963) 8

New York, C. & St. L. R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 358 F. 2d 464 (6th Cir. 1966).. 31

Norton v. Blaylock, 409 F. 2d 772 (8th Cir. 1969) 6

Nunnery v. Barber, 503 F. 2d 1349 (4th Cir. 1974)..6, 7, 15, 18

N. L. R. B. v. Montgomery Ward, 157 F. 2d 486 (8th Cir. 1946) 16

O'Brien v. Brown, 409 U. S. 1 21

Precision Inst. Mfg. Co. v. Automotive M. M. Co., 324 U. S. 806 (1945) 32

Progress Development Corp. v. Mitchell, 182 F. Supp. 681 (N. D. Ill. 1960); rev'd in part 286 F. 2d 222 (7th Cir. 1961) 31

Speiser v. Randall, 357 U. S. 513 (1958) 12

United Public Workers v. Mitchell, 330 U. S. 75 (1947) 24-25

United States v. Robel, 389 U. S. (1967) 10, 11

U. S. Civil Service Commission v. National Association of Letter Carriers, 413 U. S. 548 (1973) 9

Vitarell v. Seaton, 359 U. S. 535 (1959) 19

Walton v. House of Representatives, 265 U. S. 487 (1924). 32

Wieman v. Updegraff, 344 U. S. 183 (1952) 10

Yakus v. U. S., 321 U. S. 414 (1944) 31

Young v. Coder, 346 F. Supp. 165 (M. D. Pa. 1972) 6

CONSTITUTION.

United States Constitution, Amendment I, XIV ..5, 7, 8 *passim*
United States Constitution, Article IV, Section 4 22

OTHER AUTHORITIES.

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Note: Patronage Dismissals: Constitutional Limits and Political Justifications, 41 U. Chi. L. Rev. 297 (1974).. 6
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now come the petitioners, Richard J. Elrod, individually and as Sheriff of Cook County, Illinois the Democratic Organization of Cook County, Democratic County Central Committee of Cook County and Richard J. Daley, individually and as President and Chairman of said Organization and Committee, by their attorneys, and pray for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the final order of that court in the above entitled cause, and in support of the petition state as follows:

REPORT OF OPINION.

The opinion of the Court of Appeals is reported in 509 F. 2d 1133 (7th Cir. 1975). A copy thereof is appended hereto as Appendix A.

JURISDICTION.

This petition is filed pursuant to Rule 21 *et seq.* of the Rules of the Supreme Court of the United States.

(i) The judgment sought to be reviewed was entered on January 30, 1975 (Appendix A).

(ii) The order denying a petition for rehearing was entered on April 24, 1975 (Appendix B).

(iii) Jurisdiction for review herein is conferred by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is there any First Amendment Constitutional prohibition against discharging non-civil service governmental employees for political reasons, bearing in mind that all courts that have considered the question, *except the Seventh Circuit*, have held no such constitutional prohibition exists.

2. In considering the constitutional "balancing of interests" question here between the private interest in freedom of political association and the public interest in effective unsubverted governmental operation, should the balance be resolved in favor of the public interest because: (1) First Amendment Rights are not absolute and specific rights thereunder receive differing degrees of protection under differing circumstances, and a limitation is essential for the effective discharge of executive governmental office; (2) First Amendment Rights of the public employer; (3) basic concepts of the philosophy of representative government; (4) the doctrines of separation of powers, political questions and justiciability; (5) the irrational consequences of a contrary disposition, and (6) an objective review of the patronage system.

3. Can a preliminary injunction be properly granted where circumstances of grave damage to the public interest in the operation of a governmental office exist.

STATEMENT OF THE CASE.

Each of the individual respondents-plaintiffs was a non-civil service employee of the Sheriff of Cook County, Illinois on or before December 7, 1970, when Richard J. Elrod, a Democrat, replaced Joseph Woods, a Republican, as Sheriff. The respondents-plaintiffs were also active members of the Republican party who actively campaigned and worked for Sheriff Elrod's Republican opponent in the 1970 Sheriff's election. The respondents-plaintiffs were not protected by Civil Service or other laws against summary discharge from their employment. At some point subsequent to December 7, 1970, the date Elrod took office as Sheriff, the respondents-plaintiffs, with one exception, were dismissed from their employment allegedly because they were Republicans and had refused or failed to obtain Democratic sponsorship by agreeing to work for or contribute to the Democratic party. At the time the complaint was filed, the last respondent-plaintiff was allegedly in imminent danger of discharge for the same reason.

The complaint also alleged that Mr. Elrod effected the dismissals of the respondents-plaintiffs "under the direction and control of and in conspiracy" with the petitioners-defendants here, the Democratic Organization of Cook County, Democratic County Central Committee of Cook County and Richard J. Daley, the Chairman of said groups.

The crux of respondents-plaintiffs' complaint was that their dismissals were based upon their political associations and that this violated their rights under the First and Fourteenth Amendments to the Constitution.

Ultimately, the District Court granted petitioners-defendants' motion to dismiss for failure to state a claim upon which relief may be granted. In reaching this conclusion Judge Bauer ex-

pressly relied upon the decision in *Alomar* v. *Dwyer*, 447 F. 2d (2nd Cir. 1971) *cert. denied* 404 U. S. 1020 (1972), which held:

> " '. . . the . . . hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliation' . . . [T]he sole protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations." (p. 483)

However, the Court of Appeals for the Seventh Circuit, relying on its intervening decision in *Illinois State Employees Union* v. *Lewis*, 473 F. 2d 561 (1972), reversed, holding that the dismissal of a non-civil service public employee because of his poitical associations is violative of the First and Fourteenth Amendments to the Constitution.

ARGUMENT.

REASONS FOR GRANTING THE WRIT.

Introduction.

Petitioners respectfully urge the Court to grant the writ for the following reasons:

First, the Seventh Circuit in the present cause, and in *Lewis, supra,* is the only court that has held, and *"without direct precedent"*,[1] that a constitutional prohibition exists against discharging non-civil service governmental employees for political reasons. The Seventh Circuit thus is *in direct conflict* with the decisions of the Second Circuit, Fourth Circuit, Eighth Circuit, D. C. Circuit, lower federal decisions, decisions of this Court and of the Supreme Court of Pennsylvania. (*Alomar* v. *Dwyer,* 447 F. 2d 482 (2nd Cir. 1971) *cert. denied* 404 U. S. 1020 (1972); *Nunnery* v. *Barber,* 503 F. 2d 1329 (4th Cir. 1974); *Norton* v. *Blaylock,* 409 F. 2d 772 (8th Cir. 1969), *aff'g.* 285 F. Supp. 659, 662, 663; *Bailey* v. *Richardson,* 182 F. 2d 46 (D. C. Cir. 1950), *affd.* 341 U. S. 917; *Indiana State Employees Assn., Inc.* v. *Negley,* 365 F. Supp. 225 (D. C. Ind. 1973); *Young* v. *Coder,* 346 F. Supp. 165 (M. D. Pa. 1972); *Moldawsky* v. *Lindsay,* 341 F. Supp. 1393 (S. D. N. Y. 1972); *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950); *Arnett* v. *Kennedy,* 94 S. Ct. 1633, 1660 N. 7 (1974); (*American Federation of State, County and Municipal Employees* v. *Shapp,* 443 Pa. 527, 280 A. 2d 375 (1971). This Court should grant the writ, to resolve the conflict on this

1. *Nunnery* v. *Barber,* 503 F. 2d 1349, 1352 (4th Cir. 1974). Note, Patronage Dismissals: Constitutional Limits and Political Justifications, 41 U. Chi. L. Rev. 297, 316-7 (1974); Note, Public Employees—Freedom of Association—Discharge of Non-Policy Making Public Employees' Freedom of Association, 26 Vand. L. Rev. 1090, 1097 (1973).

momentous federal constitutional question between the unprecedented position of the Seventh Circuit and the applicable decisions of other federal courts (several since the *Lewis* case[1a]) and of the Supreme Court.

Second, the case involves whether there is any Constitutional prohibition against discharging a non-civil service governmental employee for political reasons. Thus an extremely sensitive constitutional "balancing of interests" question is presented between the private interest in freedom of political association, and the public interest in effective governmental office operation (unsubverted by persons of opposite political affiliation). The case and the conflict presented involves a momentous, and even historic, question of federal constitutional law, having far reaching ramifications on the issues of freedom of political association, first amendment rights of the public employer, basic concepts of the philosophy of representative government, separation of powers, political questions, justiciability and an objective review of the patronage system, which have not been but should be settled by the Supreme Court.

Thirdly, the case involves the propriety of injunctive relief in the context of potentially grave injury to the public interest.

I.

NO CONSTITUTIONAL PROHIBITION EXISTS AGAINST DISCHARGING A NON-CIVIL SERVICE GOVERNMENTAL EMPLOYEE FOR POLITICAL REASONS.

A. First Amendment Rights Are Not Absolute and Specific Rights Thereunder Are Afforded Differing Degrees of Legal Protection Under Differing Circumstances.

While First Amendment rights and freedoms are fundamental, they are not in their nature absolute and it has always been recognized that they are properly subject to limitations or

1a. *Nunnery* v. *Barber, supra* (1974); *Indiana State Employees Assn., Inc.* v. *Negley, supra* (1974); See also: *Arnett* v. *Kennedy,* 94 S. Ct. 1633. 1660 N. 7 (1974).

restrictions in relation to other legal rights, duties or legally protectible interests. Thus as the Court stated in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, at page 571:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances." (See also: *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965).

And as the Court stated in *American Communications Association* v. *Douds*, 339 U. S. 382, at page 394:

> ". . . it has long been established that these freedoms (First Amendment) themselves *are dependent upon the power of constitutional government to survive.* If it is to survive it must have power to protect itself . . . *Freedom of speech thus does not comprehend the right to speak on any subject at any time.*" (Emphasis added and insert for clarity.)

Moreover, the Court has held that not all rights under the First Amendment are afforded the same degree of legal protection, and that the degree of protection afforded also varies with the circumstances involved.

Thus, as the Court stated in the *Cox* case *supra* (379 U. S. 536) at page 555:

> *"We emphatically reject the notion . . . that the First and Fourteenth Amendment afford the same kind of freedom to those who would communicate ideas by conduct . . . as these amendments afford to those who communicate ideas by pure speech."* (Emphasis added.)

The opinion below fails to note the distinction between the First Amendment right of freedom of speech *per se*, and the related but clearly distinguishable right of freedom of political association. The degree of constitutional permissible limitation of these rights in relation to proper government objectives varies widely. As was stated by Mr. Justice Harlan in his separate opinion in *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963), at page 454:

> "But as we move away from speech alone and into the sphere of conduct—even conduct associated with speech or resulting from it—the area of legitimate governmental interest expands. A regulation *not directly suppressing speech or peaceable assembly, but having some impact on the form or manner of their exercise will be sustained if (it) has a reasonable relationship to a proper governmental objective and does not unduly interfere with such individual rights.*" (Insert for clarity and emphasis added.)

And as the Court stated with respect to the First Amendment freedom of association in the *specific* context of *political affiliations*, in *American Communications Assn.* v. *Douds*, 339 U. S. 382 (1950) at page 391:

> "The fact that the statute identified persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, *does not lead to the conclusion that such circumstances are never relevant.*" (Emphasis added.)

And as the Court went on to state in *Douds, supra*, at page 339:

> *"We have never held that such freedoms are absolute . . . When a particular conduct is regulated . . . (which) . . . results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interest demands the greater protection under the particular circumstances presented."* (Insert for clarity and emphasis added.)

If there were any question as to the continued validity of these principles, it was answered by this Court in *U. S. Civil Service Commission* v. *National Association of Letter Carriers*, 413 U. S. 548 (1973). The Court stated at page 567:

> "Neither the right to associate nor the right to participate in political activities is absolute in any event. See, e.g., *Rosario* v. *Rockefeller*, U.S. (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972); *Bullock* v. *Carter*, 405 U.S. 134, 140-141 (1972); *Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968)."

The opinion below is bottomed essentially on the erroneous assumption that membership in a particular political party is an absolute First Amendment freedom not subject to any limitation. If this were true, then the conditioning of public employment on any political party affiliation consideration would constitute an infringement of First Amendment rights and would be actionable under the "Fourteenth Amendment Right" doctrine. However, as shown above, *no* First Amendment rights are absolute and *all* are subject to constitutionally permissible restriction or limitation under certain circumstances. Furthermore, here not *pure* speech, but more substantively conduct associated therewith speech, is involved. In the context of other paramount considerations which the Seventh Circuit has overlooked (and as will hereafter be noted) the limitation on freedom of association involved in the context of non-civil service employment is completely reasonable in light of the governmental interest involved.

B. The Freedom of Political Association Per Se.

The constitutional concept relied upon by the Seventh Circuit in sustaining the plaintiffs' claims in *Lewis,* and thus now in this cause, is the freedom of association. The only authorities relied on by the Respondents in Seventh Circuit below relating to political association were the Communist loyalty oath cases.[2] However, these cases do not hold that public employment cannot be conditioned on political party affiliation. They hold that public employment cannot be conditioned on the performance of an act of disclosure of political affiliation, *when the performance of the act may subject the employee to criminal sanc-*

2. *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961); *U. S.* v. *Robel,* 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967).

tions and the non-performance subject him to serious stigma.[3] To say that these cases stand for the proposition that public employment cannot be conditioned on political party affiliation incident to the concept of freedom of association is simply a tortured construction of the cases.

More significantly, however, there is specific and explicit authority for the proposition that public employment or benefits, can properly be conditioned on political party affiliation, without impairing the First Amendment freedom of political association. As was pointed out in sub-point A above, this Court specifically held in *American Communications* v. *Douds,* 339 U. S. 382 (1950) at page 391:

> "The fact that the statute identifies persons by their political affiliations and beliefs . . . *does not lead to the conclusion that such circumstances are never relevant.*" (Emphasis added.)

Moreover, in the *Douds* case which specifically dealt with freedom of political association, the Court also characterized restrictions or limitations thereof at page 399, as constituting the regulation of:

> *". . . conduct . . . (which) . . . results in an indirect, conditional, partial abridgement of speech . . ."* (Emphasis added.)

While the *Douds* case is most relevant in the case at bar (as will be discussed hereafter in more detail), it is to be observed that the principle of conditioning public employment or benefits on considerations relating to political party affiliation, and accordingly freedom of association, has also been upheld in other contexts in the cases of *Garner* v. *Board of Public Works,*

3. See: *Robel* case, 389 U. S. 258, 265:
"The act in question put appellee to the choice of surrendering his organizational affiliation . . . or giving up his job. When [he] refused to make that choice, he became subject to a possible criminal penalty or 5 years imprisonment and a $10,000 fine." (Insert for clarity).

341 U. S. 716 and *Gerende* v. *Board of Supervisors*, 341 U. S. 56. As this Court itself said in characterizing these cases in *Speiser* v. *Randall*, 357 U. S. 513, at page 527:

> "In these cases . . . there was no attempt *directly* to control speech but rather to protect . . . some interest *clearly within the sphere of governmental concern*." (Emphasis added.)

The sphere of governmental concerns in the non-civil service or patronage employment area, and the associated right to freedom of association are discussed in the next section.

C. Freedom of Political Association and Non-Civil Service Public Employment.

As shown above, First Amendment rights are not absolute and are properly subject to limitation or restriction in the public interest. The determination of the validity of any particular limitation of the freedom of association turns, as in other cases, on a balancing of interests. As the Court stated in the *Douds* case with respect to freedom of political association in the context of a particular political party affiliation as a condition of government benefit, page 399:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, *the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented*." (Emphasis added.)

In the *Douds* case, the Court held that the denial of the government benefit based on the particular political party affiliation did not violate the First Amendment right of freedom of association.

While the political affiliation in the *Douds* case was that of the communist party, and the context of the issue was rights incident to labor relations, a striking analogy can be drawn between the rationale of valid consideration for the restriction of associational rights or beliefs in *Douds* and in the case at bar.

Thus, as the Court in *Douds* stated at page 399:

> ". . . legitimate attempts to protect . . . , not from the . . . possible effects of . . . ideologies, *but from present excesses of direct, active conduct are not presumptively bad because they interfere with and, in some of its ramifications, restrain the exercise of First Amendment rights.*" (Emphasis added).

And as it stated, relative to a restriction on freedom of association based on a particular political party affiliation at page 402:

> ". . . (it) . . . does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief."

And as stated at page 403:

> "The 'discouragements' . . . proceed not against the groups or beliefs identified therein, *but only against the combination of those affiliations or beliefs with occupancy of a position of . . . power . . .*" (Emphasis added).

And as stated at page 404, with respect to the specific limitation:

> ". . . (it) . . . did not restrain the activities of the . . . Party as a political organization; nor did it attempt to stifle beliefs . . . (it) . . . touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. *And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of position . . .*" (Emphasis added).

And as stated at page 408-9:

> "If the principle that one may under no circumstances be required to state his beliefs on any subject nor suffer the loss of any right or privilege because of his beliefs be a valid one, its application in other possible situations becomes relevant. Suppose, for example, that a federal statute provides that no person may become a member of the Secret Service force assigned to protect the President unless he swears that he does not believe in assassination of the President . . . *An affirmative answer hardly commends itself to reason unless, indeed, the Bill of Rights has been converted into a 'suicide pact'*". (Emphasis added).

And as the Court most succinctly stated at page 412:

> ". . . (The First Amendment) . . . requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger . . . *It does not require that he be permitted to be the keeper of the arsenal.* (Insert for clarity and emphasis added).

Thus, it is abundantly clear that the denial of a government benefit based on particular political party affiliation is not *per se* constitutionally impermissible.

Quite to the contrary, it is permissable when reasonably necessary to protect some interest within the sphere of governmental concern. The necessity of protecting important, indeed, basic and paramount governmental interests in the area of non-civil service employment is unquestionable.

The Effective Discharge of Duties of the Executive Branch of Government.

While it is pleasant to contemplate a utopian society where political party affiliations are sublimated and all parties work together in harmony for the good of the government, unfortunately, this is not the fact of life. In *Douds, supra,* the Court articulated the dangers of political party affiliation in the context of effective government operations when it stated at page 423:

> "Parties, whether in office or out, are often irresponsible in their use and abuse of freedoms of speech and press. They all make scapegoats of unpopular persons or classes and make promises of dubious sincerity or feasibility in order to win votes. *All parties, when in opposition, strive to discredit and embarass the Government of the day by spreading exaggerations and untruths and by inciting prejudice or unreasoning discontent, not even hesitating to injure the Nation's prestige among the family of nations."* (Emphasis added).

It was based upon this realistic appraisal of "the facts of political life" that the Court in *Douds* held that the interest in freedom of political association was properly limited in light of the governmental interest.

Clearly there is no impermissible infringment of first amendment rights incident to conditioning public employment on party affiliation in the non-civil service area, for, as stated in *Douds,* there is no attempt thereby to stifle ideologies, but rather to protect from *"present excesses of direct active conduct"* (p. 399); the restriction does not prevent or punish by *criminal* sanctions (p. 402); the *"discouragement"* proceeds only against the *"combination of affiliations with occupancy of positions of power"* (p. 403); it touches only a handful of persons and leaves those few affected *"free to maintain their affiliation and beliefs subject only to loss of position"* (p. 404). And further, as shown above, any other resolution of the issue converts the Bill of Rights into a *"suicide pact"* (p. 409) *and turns over the keys of the "arsenal"* (p. 412).

Also pertinent at this point is the recent statement of the Fourth Circuit in *Nunnery* v. *Barber,* 503 F. 2d 1349 (1974). Quoting with approval *American Fed. of State etc. Employees* v. *Shapp,* 443 Pa. 527, 280 A. 2d 375 (1971) the Court said:

> "In denying to patronage employees, who had obtained through political affiliation their jobs relief from discharge, the [Shapp] Court stated tersely that those who 'live by the political sword must be prepared to die by the political sword' and, in dying by the political sword, acquire no constitutional right to relief. It phrased its conclusion thus (280 A. 2d at p. 378):
>
> > 'We specifically hold that State employees who obtained their positions (jobs)—as *all the parties agree they did*—by politics or party patronage, and complain of being fired solely on the grounds of political sponsorship or affiliation, have (1) no . . . Constitutionally protected right to their jobs under (a) either the Federal or (b) the State Constitution . . .'". (pp. 1358, 1359).

First Amendment Rights of the Public Employer.

While the petitioners submit that the above should be dispositive on the issue of the balancing of the interest of freedom of association in the non-civil service employment context, it is to be observed that additional considerations weigh on the side of a constitutionally permissable restraint based on political party affiliation.

While political office is involved herein, the basic relationship of employer-employee exists. The issue of first amendment rights in the context of an employment relationship has arisen in the field of labor relations and is relevant to the case at bar. The leading case is that of *N. L. R. B.* v. *Montgomery Ward*, 157 F. 2d 486 (8th Cir. 1946), which involved the balancing of the common law duties and obligations incident to the employment relationship and the reconciliation of the same with first amendment rights. The court held that incident to the employment relationship, the employee owes the duty of care, obedience, allegiance and loyalty (*Supra*, 157 F. 2d at 496-8). More significantly, however, for the purposes herein, in the context of these duties, it was argued in that case that first amendment rights were violated by the employer incident to certain acts and conduct which constituted unlawful "coercion" of the employees. The acts complained of were, the expression by the employer of his opinion, position, policy or views of matters relating to association activities (unions) during the working hours; compulsory attendance at meetings for discussion and presentation of such matters and of policy between the employer and employees and statements concerning loss of employment or liability of employees for participation in certain employment rights (*Supra*, at pages 498-500).

In disposing of this argument of "coercion", the court observed that the employer, like the employee, also has first amendment rights which are guaranteed by the constitution. In regard to the employer's rights, the court stated at page 499:

> "The first amendment is concerned with the freedom of thought and expression of the speaker or writer, not with the conditions under which the auditor or listener receives the message. *One need not, as a condition precedent to his right of free speech under the first amendment, secure permission of his auditor. The first amendment does not purport to protect the right of privacy, nor does it require that they shall have volunteered to listen . . . speech is very frequently invoked as a means to persuade those who do not agree with the speaker and may not even wish to hear him.*" (Emphasis added).

In expressing the rationale of the decision the Court succinctly stated at page 500:

> *"The first amendment is intended to assure a privilege that in itself must be so actual and certain that fear and doubt are absent from the individuals mind, or the freedom is but an abstraction. If the speaker must hesitate before uttering his thoughts, if he must weigh and nicely balance every word so as to determine whether what he is about to say is permitted or forbidden, the guaranty tendered by the Constitution is little more than theoretical. He is wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion, Thomas* v. *Collins, supra. If subtleties may be invoked as the basis for any inference that non-coercive remarks may have had an 'altered import' in the minds of the listeners, any employer would be subjected not only to the varied understanding of his hearers, but also subjected to the chance of what the board may infer. We think such a doctrine would take away all security for free discussion.*" (Emphasis added).

The public executive officer obviously has no worse rights with regard to expecting and demanding the common law duty owed by an employee as any private employer. It would not seem necessary to note that partisan political party consideration are of the essence in employment in the elective-appointive public office and a matter vitally touching the interest of the public employer. More significantly the public officer has

the right of freedom of speech as to political matters and historically, the legal right to condition public employment on political considerations. The destructive effect on these rights would be palpable if the officer could not utter his thoughts, or exercise the right incident to his office, without being "*wholly at the mercy of the varied understanding of the employee, and consequently of whatever inference may be drawn as to his intent and meaning.*" *(Montgomery Ward, supra).* If respondent's position in this case is upheld, the concerns so well expressed by Judge Campbell in *Illinois State Employee Union, Council 34, AFL-CIO* v. *Lewis,* 473 F. 2d 561 (7th Cir. 1972), *cert. den.,* Feb. 20, 1973, are certain to occur. As judge Campbell predicts if "Any and all such employees who are discharged can state an actionable claim in the federal district court by simply alleging . . . that the discharge was caused by political party affiliations or activities," the courts indeed will become "super civil service commisions." The Fourth Circuit in *Nunnery,* was thus moved just last year to state:

> "We find convincing the point that the delineation between the employees who are and who are not protected from patronage discharge poses an issue which should be resolved legislatively, not judicially . . ." (503 F. 2d at 1356).

The "chilling" effect on the public employer's right of freedom of speech and political association is manifest.

Separation of Powers.

While the discharge of duties of public office and efficient administration are perhaps the most immediate and devastating effects of the decision below some additional effects are to be noted.

Incident to the fundamental doctrine of separation of powers, it has long been recognized that executive office carries with it the power of appointment or removal at will. In the case of *Myers* v. *United States,* 272 U. S. 52 (1926), the Court passed upon the unrestricted right and power of the chief executive to

remove his appointee. It held that the right and power was implied from those constitutional provisions which establish where the executive power is vested (272 U. S. at 163-4) and the duty to faithfully execute the law (272 U. S. at 164). The reasoning of the Court reflects the public interest considerations involved in this right and power. The Court stated at page 117, that the chief executive:

> ". . . alone and unaided could not execute the laws. He must execute them by the assistance of subordinates . . . even in the absence of expressed words . . . as part of his executive power *he should select those who were to act for him . . . in the execution of the laws . . . as his selection of administrative officers is essential to the execution of the laws . . ., so must be his power of removing those for whom he cannot continue to be responsible.*"

The *Myers* case is particularly significant with respect to the case at bar since the case revolved around the federal tenure of office act which was passed during President Andrew Johnson's administration because of, as the Court states in *Myers* at page 151:

> "The alleged general use of patronage for political purposes by the President."

Moreover, as one of the reasons for its decision establishing the absolute power of removal in the chief executive the court in *Myers* stated at page 164:

> ". . . to hold otherwise would make it impossible. . . in case of political . . . differences . . . to take care that the laws be faithfully executed."

It is to be noted that the *Myers* case has never been overruled or even modified by the Supreme Court. This principle preceded the Myers case[4] and has been followed since.[5]

4. *Crenshaw* v. *United States,* 134 U. S. 99, 108, 10 S. Ct. 431, 434 (1890); *Keim* v. *United States,* 177 U. S. 290, 20 S. Ct. 574 (1900); *Taylor and Marshall* v. *Beckham* (No. 1), 178 U. S. 548, 575, 20 S. Ct. 890 (1905).

5. *Vitarelli* v. *Seaton,* 359 U. S. 539, 79 S. Ct. 968 (1959).

Political Question.

While the area of technical justiciability is considered to have been broadened by the case of *Baker* v. *Carr*, 369 U. S. 186 (1962), the precise rationale of the opinions rendered in the *Baker* case would weigh on the side of non-intervention by the judiciary in this specific area.

In *Baker* v. *Carr*, Mr. Justice Douglas, with the majority, concedes at page 245:

> "There are, of course, some questions beyond judicial competence. Where the performance of a 'duty' is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or the other, . . . for to do so would be to take over the office."

Mr. Justice Clark, with the majority gives a very persuasive reason why he would not have voted as he did in *Baker* v. *Carr* if the design of the State's voting districts had not been completely irrational. At pages 258 and 259 he states:

> "Although I find the Tennessee apportionment statute offends the Equal Protection Clause, *I would not consider* intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But *the majority of the people* of Tennessee have no practical opportunities for exerting their political weight at the polls to correct the existing "invidious discrimination." (Emphasis added).

Mr. Justice Stewart, with the majority, at page 265 concedes that it is the "irrational" basis of Tennessee's voting districts that generated the Supreme Court's power to interfere.

Mr. Justice Frankfurter, in his dissent in *Baker* v. *Carr* stated at page 267:

> "Disregard of inherent limits in the effective exercise of the Court's judicial power' . . . presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined."

And stated at page 270:

> "There is not under our Constitution a judicial remedy for every political mischief . . . The Framers carefully and with deliberate forethought refused so to enshrine the judiciary . . . appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."

And stated at page 287:

> "What renders cases of this kind nonjudiciable is not necessarily the nature of the parties to them, for the Court has resolved other issues between similar parties; nor is it the nature of the legal question involved, for the same type of question has been adjudicated when presented in other forms of controversy. *The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which government and the actions of government are made and unmade.*" (Emphasis added) (See also: *O'Brien* v. *Brown*, 409 U. S. 1, 92 S. Ct. 2718, 2720 (1972)).

From the above, it would appear fair to observe that the absence of any non-judicial effective relief by a *"majority of the people"* was the *sine qua non* of the Baker decision on justiciability. It would seem unnecessary to note that a *"majority of the people"* have effective relief against an elected official who does not do a job of hiring and firing satisfactory to the people —they vote him out of office.

Philosophy of Representative Government.

As was stated by Mr. Justice Douglas in the *Baker* case, at page 245:

> "Where the performance of a 'duty' is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or the other . . . *for to do so would be to take over the office.*" (Emphasis added).

This statement is but a reflection of the American philosophy of representative government. The people elect their representatives to carry out the function of office. The majority of the people make the selection of the man they wish to assume that office and he is vested with those indefinite, administrative responsibilities and discretion of executive office. The governmental system provides the sanction for his failure to exercise them to the satisfaction of the people—removal from office at the next election.

The majority of the people did not select the judiciary to perform those functions, nor to control the executive in the exercise of those functions. Insofar as the exercise of those functions do not infringe on constitutional rights, the control thereof by the judiciary is tantamount to *"taking over"* the office and more significantly, depriving the electorate of its only sanction for the unsatisfactory performance of executive office to wit, *non re-election.*

The caveat of Justice Frankfurter in *Baker* v. *Carr, supra,* at page 749 is relevant in this regard:

> "The influence of those converging considerations—the caution not to undertake decisions where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill adapted—has been decisive of the settled line of cases, reaching back more than a century, which holds that Art. IV, Sec. 4 of the Constitution, guaranteeing to the States 'a Republician Form of Government is not enforcible through the courts.' "

It would seem persuasive, that if the judiciary does not enforce the guarantee of Article IV, Section 4 of the Constitution, it should abstain from any possible impairment of the institutions, sanctions or natural operations thereof.

D. The Irrational Consequences of the Seventh Circuit Position on the Issue of Freedom of Political Association.

As heretofore noted, the position of the Seventh Circuit stands in stark conflict with that of four other circuits. The unsoundness of the Seventh Circuit position is further highlighted by the irrational consequences which are effected by that position.

In a separate opinion by Judge Campbell in the *Lewis* case (473 F. 2d 576-9) some of these consequences are noted. First, it was observed that the impact of the position is to thrust the federal courts into the administration and daily operations of state and local government, converting the federal judiciary into a "super civil service commission" for all state and local employees not covered by civil service law. It was estimated that the number of trials and appeals which could arise incident to the *Lewis case alone,* from *one* department of a State and *one* change of administration in that department totalled almost 2,000. As Judge Campbell stated, the volume of potential federal litigation resulting "truly becomes catastrophic".

In addition the difficulty in fashioning appropriate and workable judicial standards for distinguishing between "policy making" and "non-policy making" positions is obvious. Moreover, it results in the constitutional rights of individuals being governed by the nature of their employment and accordingly the establishment of a doctrine of a "sliding scale" of constitutional rights according to rank, title, job description or duties, and whether in or out of government.

Finally Judge Campbell noted the vexing problem which emerges concerning the "burden of proof" standard in such cases. This results from the fact that since a "civil service system" cannot be judicially imposed on a state or local government, the public employer cannot be compelled to explain the reasons for termination of employment.

While other examples of irrational results could be catalogued, it would seem that the basic falacy in the "policy"—"non-policy making" distinction created by the Seventh Circuit, lies in its implicit assumption that loyalty is only important to effective execution of governmental office at the high eschelons of employment. We would submit in this regard that while the General and his Staff map the strategy, it is the soldier in the field who fights the battle. It would seem manifest that loyalty at the "battle field" level is as important and indeed essential as at the "headquarters" level!

E. The Patronage System.

The patronage system *per se* is not "on trial" in the case at bar. It would, however, be naive to think that the popular conception of the "evils" of that system are not a factor bearing upon the resolution of the true issue herein. Accordingly, the following observation and authorities are submitted relative to the "system" and, the question of the functions of the judiciary in respect thereto.

It is fundamental that social or political reform is not the proper function of the judiciary, but rather is the function of the executive or legislative branches of government. As this Court itself stated in discussing the role of the judiciary in the context of political activities and the patronage system in particular in *United Public Workers* v. *Mitchell*, 330 U. S. 75 at page 89:

> "As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstraction' are requisite. This is as true of declatory judgments as any other field. These appellants seem clearly to seek advisory opinions upon board claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution."

> "The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill defined controversies over Constitutional issues, they would become the organ of political theories."

And in discussing the proper branch of government for the resolution of questions involving the patronage system, public employment and political activities, the court stated in *Mitchell, supra*, at page 99:

> "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by . . . employees in politics as party officers or workers, we see no constitutional objection."

And as the court further stated with respect to the need or the extent of the regulation of political activities of public employees, at page 102:

> "The use of the constitutional power of regulation is for Congress, not for the courts . . ."
>
> "The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress."

Abraham Lincoln, as well as our founding fathers, Washington, Adams and Jefferson, were unequivocally committed to the proposition that under our form of government, executive office must posesss the power of appointment and removal based

on considerations of political party, philosophies or beliefs. (Fish, The Civil Service and the Patronage, (2nd pub'n. 1963) pp. 7, 13, 23, 27, 172).

Moving into modern times, relative to the Roosevelt administration in 1930's, it is stated in Farley, *Patronage And The New Deal,* American Magazine (Sept. 1938), at page 76:

> "Some of the greatest troubles the President has had were caused by subordinate officials who were in sharp disagreement with his policies and, rightly or wrongly, were sabotaging the job he was trying to acomplish."

And as the author stated at page 78:

> "To my way of thinking . . . [the patronage system] is the most democratic way of all and, in the long run, the best way of getting competent people." (Insert for clarity and emphasis added).

In even more contemporary times, then Senator Paul H. Douglas of Illinois had comments on the patronage system. In Douglas, New Republic, July 14, 1952, it is stated at page 4:

> "In short, I am for civil service but not for having civil service dominate public employment 100 percent. That would give us the bureaucracy of Germany and France which I do not regard as ideal."
>
> "But I would like to have you consider just how long most liberals would be able to last in Congress if you stripped us of all patronage, as you desire. We who try to defend the interests of the people, the consumers and the taxpayers commonly face the powerful opposition of the special interest groups which will spend enormous sums of money to defeat us . . . If we are to survive we need some support rooted in gratitude for material fovors which at the same time do not injure the general public."

Another aspect of "special interest groups" and the patronage system comes into play in the context of the argument that the taxpayer bears the cost of political parties through the system. However, as is stated in Schoen, *Politics, Patronage and The Constitution,* 3 Ind. L. F. 35 at page 64, footnote 103:

> "The patronage system seemingly makes the taxpayer contribute to a party without his consent, for it is the taxpayers money that pay the employee's salaries. ***But it is better than having the party totally committed to people who own oil wells or airlines.***" (Emphasis added).

The argument has also been advocated that the abolition of the patronage system would improve the quality of government through career employees. Fish, *supra,* makes the following observation in this regard at page 233:

> "(under patronage) . . . any positions might lead anywhere, and that quickly; removal was constantly impending; government service was speculative, and because of the opportunities it afforded attracted clever, sometimes brilliant, men. *Now* (under civil service) ***it offers, in the main, the advantage of steady, light employment at a moderate remuneration and attracts the steady-going and unimaginative.***" (Insert and emphasis added).

To the same effect is the author's conclusion in Wilson, ***"The Bureaucracy Problem"***, Public Interest No. 6 (Win. 1967), where it is stated at page 5:

> "To be responsive, one must be willing to run risks, and the career civil service is not ordinarily attractive to people with a taste for risk."

Another area of contrast between the patronage system and its alternative is reflected in an article by Jean J. Couturier, the Executive Director of the National Civil Service League. In Couturier, ***"Patronage Versus Performance—The Balance Sheet of Civil Service Reform"***, Good Government, Fall 1967, the author states at page 15:

> "Public employment was historically considered a sacred trust. It has also been thought of as a training ground for the disadvantaged and a source of employment for the needy. Further, as distinguished from the area of political patronage, it has been thought of as a place to reward those who have done great service to their society. There is pressing need to rethink these concept if we are to have

> the most efficient possible public service. If it is desirable to in some way make public employment a social tool, such as through veterans' preference or residence requirements, the scope and methods of so doing must be evaluated and the limits defined."

And in further discussing the results of overemphasis on civil service systems, he states:

> "Ironically, merit systems have all too often been perverted to protect and provide a sanctuary for those on payroll. While development of career concepts is fundamental to the success of any large enterprise, these concepts should not be manipulated to prevent entry of competent people. All too often civil service selection systems are effectively closed corporations."

It is ironic that in these very areas where the civil service fails, a decently run patronage system excels: 1) opportunity and training ground for the disadvantaged; 2) a source of employment for the needy; 3) the disabled veteran; 4) veterans' preference; 5) residence requirements for broad based representation in public office. Samuel Lubell has also commented on this aspect of the patronage system. In Lubell, The Future of American Politics, Third Edition, 1965, he states at page 85:

> "Patronage is peculiarly important for minority groups, involving much more than the mere spoils of office. Each first appointment given a member of any underdog element is a boost in that element's struggle for social acceptance. It means that another barrier to their advance has been lifted, another shut door has swung open."

And as is stated in Moynihan and Wilson, "*Patronage in New York State, 1955-1959*", Amer. Pol. Sci. Rev., Vol. 58, No. 2 (June 1964), at page 296:

> 'Recognizing certain groups in the community by appointing some of their members to office has long been thought to be a principal function of patronage."

Still other observations on the patronage system can be noted.

In White and Smith, Politics and Public Service (1939) it is stated at page 85:

> "Professor William Y. Elliott, of Harvard University, who sees no alternative to executive leadership but who hates the purchase of consent by patronage, can find no other means of securing effective political leadership except by a complete abandonment of the whole presidential system in favor of cabinet government on the English model. Thus greatly rises the price of freedom from patronage—and there is ground for doubt whether even this change would produce the desired result.

In Key, Politics, Parties and Pressure Groups (5th Ed. 1964), the author states at page 369:

> "The truth is that we have contrived no system for the support of party that does not place considerable reliance on patronage. The party organization makes a democratic government work and charges a price for its services. Sometimes it becomes corrupt and levies an exorbitant charge. Fortunately not all political organizations are corrupt, and over the long run the spoils system has come to operate within narrower bounds. Yet until we invent some other system of political financing or new incentives for party service, the government, directly or indirectly, will contribute to the support of party activity."

While the above is just a sampling of the literature on the patronage system, it is submitted that it represents an objective summary. While the patronage system has produced some abuses, it has also performed significant social, economic and political functions. To abolish it for the former, and in spite of the latter again brings to mind the words of Justice Frankfurter, who noted in the *Douds* case, at page 419:

> ". . . *one should not throw out the baby with the bath or burn the house in order to roast the pig.*" (Emphasis added).

As noted earlier, the problems involved are legislative in nature and to date no satisfactory substitute has been conceived by man.

II.

A PRELIMINARY INJUNCTION CANNOT PROPERLY BE GRANTED HEREIN.

The Court of Appeals essentially held that since there was a reasonable probability of respondents prevailing on the merits, a preliminary injunction could properly be granted. In so doing, the court ignored the unique issue of public interest herein and traditional principles of federal equity power.

A. If an Injunction Were Granted, Irreparable Injury Would Be Suffered by the Defendants and the General Public.

In considering whether a preliminary injunction shall issue, the court must also consider whether an injunction will cause substantial harm to the defendant or to the public. *Eastern Airline* v. *Civil Aeronautics Board, et al.*, 261 F. 2d 830 (2nd Cir. 1958). The harm resulting from an injunction in this case will substantially injure the public generally as well as the defendants, because an injunction would seriously curtail the effectiveness of a major Cook County law enforcement office. If an injunction issued, the court would be required to hold hearings to review each and every instance of hiring, firing, promoting or demotion in the Sheriff's Office during the pendency of the injunction in each instance where the plaintiffs alleged political considerations were involved in the action. In those cases where the basis for hiring or firing involved confidential and privileged law enforcement information, such confidential information would have to be disclosed in order to explain the reason for the hiring or discharge. The damages to the defendants and the public are so prevading that it is not possible to ascertain the amount of bond that would have to be posted by the plaintiffs in compliance with Rule 65(c) of the Federal Rules of Civil Procedure.

The factors which the courts consider in granting injunctive relief in equity litigation between private parties differ from those considered in actions for injunctive relief where the public interest is involved. Chief Justice Stone in *Yakus* v. *United States*, 321 U. S. 414, 64 S. Ct. 660 (1944) stated:

> "When an injunction is asked *which will adversely affect a public interest for whose impairment, even temporary, an injunctive bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff* . . . this is but another application of the principle, declared in *Virginia R. Co.* v. *System Federation*, 300 U. S. 515, 552, 57 S. Ct. 592, 81 L. Ed 789, that 'courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest, than they are accustomed to go when only private interests are involved.' " (Emphasis added.)

In *Gaines Dry Cleaners* v. *City of Chicago*, 123 F. 2d 104 (7th Cir. 1941) the plaintiff sought to restrain the City of Chicago from interfering with the operations of its business. In affirming the trial court denial of the motion for an injunction the court stated:

> "A federal court will rarely interfere, through temporary (or permanent) injunction, with the conduct of municipal government by the city's administrative officers." Page 105.

Injunctive relief is an awesome power *New York C. & St. L. R. Co.* v. *Brotherhood of Local Firemen & Enginemen*, 358 F. 2d 464, 469 (6th Cir. 1966) and a drastic remedy requiring courts to proceed with caution before granting such relief. *Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681, 711 (N. D. Ill. 1960), rev. in part on other grounds 286 F. 2d 222 (7th Cir. 1961). If such relief were granted in this case, the public, rather than the plaintiffs, would be irreparably injured.

B. Federal Equity Power Is Limited by Traditional Principles of Equity Jurisdiction.

The suit herein is, in essence, an action for equitable relief against a state officer with respect to acts relating to public employment in an elected state office.

The restrictions of federal equity power in such matters and the limitation to traditional powers of equity cannot be questioned.

As was stated in the case of *In re Sawyer*, 124 U. S. 200 (1887) at page 212:

> "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal."

And as the Court further stated (in quoting from an Illinois Supreme Court decision) at page 214:

> ". . . nor do matters of a political nature come within the jurisdiction of the court of chancery . . ."

In the case of *Walton* v. *House of Representatives*, 265 U. S. 487, a claim of improper removal from state office by state officers was involved and the charge that the removal was prompted by "wrongful motive and prejudice" and that removal would effect "a denial of . . . due process and equal protection . . . under the Fourteenth Amendment . . ." The court stated at page 490:

> "A court of equity has no jurisdiction over the appointment and removal of public officers . . . and particularly are the courts of the United States, sitting as courts of equity, without jurisdiction over the appointment and removal of state officers. . . ."

In addition the equitable maxim of clean hands is particularly applicable herein. As the Supreme Court stated in *Precision Inst. Mfg. Co.* v. *Automative M. M. Co.*, 324 U. S. 806, 814-15 (1945):

> "The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of iniquity." ***Bein*** v. ***Heath, 6 How.*** 228, 247, 12 L. Ed. 416."

In the case at bar the plaintiffs seek equitable relief for the protection of their employment because of assertedly improper, unlawful and reprehensible conduct and practices on the part of the defendants, and yet, plaintiffs admit that they obtained their employment by virtue of the same conduct, practices and indeed the "system" which they so forcefully condemn.

CONCLUSION.

Wherefore, since the decision below involves a momentous, far reaching question of federal constitutional law which should be settled by this Court, and the decision below is in direct conflict with the decisions of other federal Courts of Appeal on this same matter, it is prayed that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX.

EXHIBIT A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

JOHN BURNS, et al.,
Plaintiffs-Appellants,

Nos. 71-1785, 72-1541 *vs.*

RICHARD J. ELROD, individually and as Sheriff of Cook County, Illinois, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—No. 71 C 607.
JULIUS J. HOFFMAN, *Judge,* WILLIAM J. BAUER, *Judge.*

Argued October 23, 1973—Decided January 30, 1975.

Before KILEY, *Senior Circuit Judge;** CAMPBELL, *Senior District Judge;*** and GRANT, *Senior District Judge.****

CAMPBELL, *Senior District Judge.* Plaintiffs appeal from two orders of the United States District Court for the Northern

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* Senior Circuit Judge Roger J. Kiley, deceased, did not participate in the decision in this case.

** Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

*** Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

District of Illinois, the first denying their motion for a preliminary injunction and the second dismissing their complaint for failure to state a claim upon which relief might be granted. We reverse and remand the cause for further proceedings not inconsistent with the views expressed herein.

The individual plaintiffs, with one exception, were employees of the Office of the Sheriff of Cook County, Illinois, on and before December 7, 1970. They were not protected by Civil Service or other laws against summary discharge from their employment. Subsequent to December 7, 1970, the date on which Richard J. Elrod took office as Sheriff of Cook County, these plaintiffs were fired, allegedly because they were either members of the Republican rather than the Democrat Party, did not have the requisite political sponsorship from the Democrat Party or because they failed to pledge their political allegiance to, work for or contribute to the Democrat Party. Sheriff Elrod is alleged to be a Democrat. Plaintiff Fred Buckley, at the time the complaint was filed, was still employed by the Sheriff in Cook County, but alleged that he was in "imminent danger" of being fired for the same reasons that allegedly caused the other plaintiffs' dismissals.

The defendants include Richard J. Elrod, Sheriff of Cook County, at whose direction the dismissals are claimed to have been made; Richard J. Daley, President of the Democratic Organization of Cook County and Chairman of the Democratic County Central Committee of Cook County; the Democratic Organization of Cook County; and the Democratic County Central Committee of Cook County. Plaintiffs charged that Mr. Daley and the defendant organizations were also responsible for the dismissals of plaintiffs, alleging that Mr. Elrod effected the dismissals "under the direction and control of and in conspiracy" with these defendants.

The gravamen of plaintiffs' complaint is that, because their dismissals were based upon their political association and beliefs, defendants' conduct violated their rights under the First and Fourteenth Amendments of the Constitution of the United States. As relief, plaintiffs prayed for a declaration of their rights, compensatory and punitive damages, and preliminary and permanent injunctions restraining defendants from conditioning plaintiffs employment on constitutionally impermissible grounds, restraining further dismissals on such grounds and ordering reinstatement for unlawfully dismissed employees.

On the grounds that loss of employment did not constitute a sufficient showing of irreparable injury and that plaintiffs had an adequate remedy at law, Judge Hoffman denied the plaintiffs' motion for a preliminary injunction. Subsequently, Judge Bauer granted defendants' motion to dismiss for failure to state a claim upon which relief might be granted. In reaching this conclusion, Judge Bauer relied upon the decision of the Court of Appeals for the Second Circuit in *Alomar* v. *Dwyer*, 447 F. 2d 482 (1971), *cert. denied* 404 U. S. 1020 (1972). *Alomar* concluded that there was no constitutional prohibition against the dismissal of governmental employees because of their political affiliations or beliefs.

Subsequent to these orders of the district court, this Circuit announced its decision in *Illinois State Employees Union* v. *Lewis*, 473 F. 2d 561 (1972), *cert. denied*, 410 U. S. 943 (1973) which refused to follow the reasoning in *Alomar*, holding instead that the dismissal of a public employee, not otherwise protected by Civil Service, because of his or her political associations or beliefs violates the First and Fourteenth Amendments of the Constitution of the United States. Although defendants argue that *Lewis* was wrongly decided and invite our reconsideration thereof,[1] we decline to do so for the scholarly and persuasive reasons articulated in Judge Stevens opinion in *Lewis*.[2] Plaintiffs' allegations that they were fired or threatened

1. See, *Nunnery* v. *Barber*, 503 F. 2 1349 (4th Cir. 1974).

2. See also, Note, Patronage Dismissals: Constitutional Limits and Political Justifications, 41 U. Chi. L. Rev. 297 (1974).

with dismissal because they belonged to a political party other than that of the office holder's political party, state a legally cognizable claim entitling them to an opportunity to prove their case.

Defendant Elrod resists this conclusion on the ground that under the rationale of *Lewis*, the plaintiffs occupy "policy-making" positions as a matter of law. It is maintained that the plaintiffs were deputy sheriffs and that, under Illinois law, this makes them public officials rather than public employees. *Lewis* recognized "the public executives right to use political philosophy or affiliation as one criteria in the selection of policy-making officials" and that "considerations of personal loyalty, or other factors besides determination of policy, may justify the employment of political associates in certain positions." *Illinois State Employees Union* v. *Lewis*, 473 F. 2d 561, 574 (1972). These factors were characterized as a justification for an otherwise impermissible dismissal.

Defendant Elrod reasons that since deputy sheriffs are public officials their dismissal for partisan political reasons is justified under *Lewis*. We fail to see how the label "public official" or "public employee" advances the real inquiry on whether the particular employee was "engaged directly or indirectly in the formulation or implementation of policies" of the governmental office or agency involved. *Illinois State Employee Union* v. *Lewis*, 473 F. 2d 561, 578 (Campbell, J., concurring) (1972). The "justification" or defense turns on the specific duties and responsibilities of the particular employee, not his title. Moreover, it appears that the basis for describing deputy sheriffs as "public officials" no longer exists in Illinois, as Section 9 of Article X of the 1870 Constitution of Illinois was not carried over into the 1970 Constitution of Illinois. We conclude, therefore, that the issue of whether plaintiffs were policy-making employees who may be dismissed for partisan political reasons

is a matter of factual defense to be established by defendants at trial.[3]

We consider next the question concerning the denial of plaintiffs motion for a preliminary injunction. The district court's order, by holding that the loss of employment does not constitute sufficient irreparable harm and that the plaintiffs have an adequate remedy at law, suggests that a preliminary injunction would never be appropriate in this type of case. We must reject this conclusion, for clearly more is involved than a simple loss of employment. What lies at the heart of these cases is the constitutional right of governmental employees to associate freely with political groups of their choice without official reprisal for such affiliation. See *Illinois State Employees Union* v. *Lewis*, 473 F. 2d 561 (1972), *cert. denied*, 410 U. S. 943 (1973); *Kiiskila* v. *Nichols*, 433 F. 2d 745 (7th Cir. 1970). Inasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases. Since, under *Lewis*, plaintiffs have made a sufficient showing of probability of success on the merits, the cause is remanded to the district court with instructions to enter appropriate preliminary injunctive relief during the pendency of this cause.

The complaint here was filed by plaintiffs "on behalf of themselves and all other persons who were employees of the Sheriff of Cook County on December 7, 1970 and who were not protected by Civil Service or other laws against arbitrary discharge from their employment." The district court made no determination regarding the appropriateness of the class action vehicle. As in *Lewis*, we observe that:

> "Whether the district court should now determine that a class action is appropriate, or if so, how the class or

3. See e.g., *Indiana State Employees Ass'n, Inc.* v. *Negley*, 365 F. Supp. 225 (S. D. Ind. 1973), aff'd 501 F. 2d 1239 (7th Cir. 1974).

classes should be defined, either for discovery or trial purposes, are matters best apprised by the district court in the first instance." *Illinois State Employees Union* v. *Lewis*, 473 F. 2d 561, 576 (1972).

Although the class action question must first be determined by the district court, we perceive some threshold difficulties attending that determination. While questions of law may be common to class members, factual issues relating to the reasons for discharge may vary depending upon the individual, as may the asserted justification that an individual occupied a policy making position. Finally, assuming plaintiffs can establish liability, the issue of appropriate relief may depend upon factual matters unique to various members of the asserted class. In making these observations, we express no views on the district court's ultimate determination of the class action issue. Rather, they are intended to illustrate the topics of inquiry that will doubtless occupy the district judge's attention on remand.

For the reasons stated, the two orders of the district court appealed from are reversed and the cause is remanded to the district court for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

EXHIBIT B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.
Chicago, Illinois 60604.

April 24, 1975.

Before

HON. WILLIAM J. CAMPBELL, SR., *District Judge*
HON. ROBERT A. GRANT, SR., *District Judge*

JOHN BURNS,
Plaintiffs-Appellants,

vs.

No. 71-1285, 72-1541

RICHARD J. ELROD, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (71 C 607)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.